IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Arb. Case No.26 of 2007.

Date of Decision: 3rd October, 2007.

M/s Ayush Constructions Pvt. Ltd. **claimant-Petitioner.**

Versus

State of Himachal Pradesh & others. **Respondents.**

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The Hon'ble Mr. Justice V.K. Gupta, C.J.

Whether approved for reporting?[1] Yes.

For the petitioner: Mr. Suneet Goel, Advocate.

For the respondents: Mr. Ashutosh Burathoki, Addl. Advocate General.

V.K. Gupta, C.J. (Oral).

Clause 25 of the agreement between the parties is the arbitration agreement which stipulates and lays down that the disputes between the parties shall be referred to the sole arbitration of the person appointed by the Engineer-in-Chief/Chief Engineer, HP PWD. Since apparently some disputes arose between the parties on 1st August, 2005, the petitioner addressed a communication to the Chief Engineer (South), HP PWD, Shimla in which details of the disputes were mentioned, claims were spelt out and ultimately a

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[1] Whether the reporters of Local Papers may be allowed to see the judgment?

request was made to appoint an Arbitrator in terms of the aforesaid arbitration agreement. This was followed by a reminder request addressed to the same Chief Engineer by the petitioner on 7th January, 2006. Since the respondents failed to act in appointing the Arbitrator despite the receipt of the aforesaid two communications, the petitioner invoking Section 11(6) of the Arbitration and Conciliation, 1996 approached this Court with a prayer for appointment of the Arbitrator.

The petition was filed in this Court on 17th July, 2007. It was taken up for consideration on 23rd July, 2007 when Mr. P.M. Negi, learned Deputy Advocate General appeared for the respondents and sought six weeks' time to file the reply. The matter was again listed on 21st September, 2007 in the Court.

Reply was filed by respondent No.2 on 25th September, 2007 in which inter alia it was stated that the Chief Engineer (South) in terms of the aforesaid arbitration agreement has appointed Superintending Engineer, Arbitration Circle, HPPWD, Solan as a sole Arbitrator to adjudicate upon the disputes between the parties forming the subject matter of this petition. This appointment was made by the Chief Engineer vide his Order No. PW-CTR-30-949/-07-10173-75 dated 6th August, 2007.

Based upon the aforesaid intervening development, the respondents prayed (in the reply filed by them) that the petition be dismissed because the Arbitrator already stood appointed.

Undoubtedly the appointment of the Arbitrator by the Chief Engineer was made on 6th August, 2007, i.e. at a point of time much after the present petition stood filed in this Court and much after the notice thereof was accepted as well as received by the respondents and time was sought by them to file reply to the petition. It is the undisputed case of the respondents in this petition that the Arbitrator had not been appointed by the Chief Engineer as a sequel to the request sent by the petitioner through his first communication dated 1st August, 2005 and thereafter through his reminder communication dated 7th January, 2006. It is also the undisputed case of the respondents before this Court that till as late as this petition was filed in this Court and the respondents had the knowledge of the filing of this petition as on 23rd July, 2007, the appointment of the Arbitrator had not been made. Undoubtedly the appointment of the Arbitrator was made by the Chief Engineer on 6th August, 2007.

The aforesaid act of the Chief Engineer appointing the Arbitrator after the petition stood filed in this

Court is clearly in violation of the ratio in the case of Datar Switchgears Ltd. vs. Tata Finance Ltd. and another, reported in (2000) 8 SCC 151. Dealing with an identical fact situation where the appointing authority had appointed the Arbitrator at a point of time after the petition had been filed in the High Court for appointment of the Arbitrator, their Lordships of the Supreme Court observed as under:-

> "19. So far as cases falling under Section 11(6) are concerned – such as the one before us – no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We

> do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited."

The aforesaid judgment of the Supreme Court came to be noticed in a subsequent judgment in the case of Punj Lloyd Ltd. vs. Petronet MHB Ltd., reported in 2006(1) Arb.LR 528 (SC). The fact of the Arbitrator not having been appointed till the date of the filing of Section 11(6) application in the High Court and as well as the fact of the Arbitrator having been appointed thereafter, both have been noticed in para (3) of this judgment, which reads thus:-

> "3. Disputes and differences arose between the parties. The appellant served a 30 days' notice on the respondent demanding appointment of an arbitrator and reference of disputes to him. The respondent failed to act. On expiry of 30 days, the appellant moved the Chief Justice of the High Court for appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996. Admittedly, even till the date of the moving of the application, the respondent had not made appointment consistently with the arbitration clause. The learned Judge designated by the Chief Justice of the High Court refused to appoint the arbitrator holding that the only remedy available to the appellant was to move in accordance with Clause 14.1 above said,

> whereupon the functional director would adjudicate upon the disputes as sole arbitrator."

After noticing the aforesaid facts, their Lordships approved the ratio in Datar Switchgears Ltd. (supra) by allowing the appeal filed by the appellant in that case and remitting the matter to the High Court for fresh consideration under Section 11(6) of 1996 Act.

In the case of SSJV Projects Private Ltd. vs. H.P. State Electricity Board and another, reported in 2006 (2) Shim. LC 166 it has been held by this Court as under:-

> "14. Coming to the last submission of Mr. Dogra that even if I hold that the respondents did not act as required under the procedure prescribed in the arbitration agreement in the sense that they did not appoint the Arbitrator and thus consequently, I would be entitled to invoke Section 11(6) of 1996 Act, I should merely issue a direction upon respondent No.1 to appoint the Arbitrator. The argument is totally devoid of any merit if one has in mind the scheme of Section 11 of 1996 Act and the above quoted observations of their Lordships of the Supreme Court. Once the party which neglects or fails to act as required under the procedure forfeits its right to appoint the Arbitrator, it will be a mockery of law if same party, while exercising jurisdiction under Section 11(6) of 1996 Act, is directed by the Chief Justice to appoint the Arbitrator. This situation is not at

> all contemplated by the scheme of Section 11 of 1996 Act. There is therefore, no force in the argument of Mr. Dogra."

What, therefore, clearly emerges from a combined reading of the aforesaid three judgments, two cases decided by the Supreme Court and one by this Court, is that by not appointing the Arbitrator before the applicant approaches the Court under Section 11(6) of 1996 Act, the appointing authority forfeits its right to appoint the Arbitrator and the right thereafter vests in the Chief Justice to appoint the Arbitrator under Section 11(6) of the Act. Apart from the fact that the act of the Chief Engineer in appointing the Arbitrator after the petition had stood filed in this Court and after the respondents had the knowledge of the filing of the petition being totally in contravention to the law declared by the Supreme Court as well as by this Court, this practice is hereby strongly deprecated by this Court because this Court had noticed in a few cases earlier also where either the respondent-State or the designated appointing authority resorted to the process of appointment of the Arbitrators at a point of time after the filing of the petitions in this Court and after the respondents had acquired knowledge about the same.

It is in the aforesaid background that the law on the subject is being once again declared by this Court

through this authoritative pronouncement for the information of all concerned and for total compliance. As the judgment was being dictated, Mr. Ashutosh Burathoki, learned Additional Advocate General appearing for the respondents made a statement at the Bar that the respondents be permitted to withdraw Order No.PW-CTR-30-949/-07-10173-75 dated 6th August, 2007 (supra) whereby the Chief Engineer (South), HPPWD had appointed the Arbitrator. He further submits that I should instead appoint an Arbitrator exercising my jurisdiction under Section 11(6) of 1996 Act.

The prayer of Mr. Burathoki is accepted and allowed. Order No.PW-CTR-30-949/-07-10173-75 dated 6th August, 2007 is hereby quashed and set aside consequent upon the permission granted to the respondents to withdraw the same. Mr. Sandeep Sharma, Advocate with consent of the learned counsel for the parties is hereby appointed as the Single Member Arbitral Tribunal to adjudicate upon the disputes between the parties forming the subject matter of this petition.

The parties shall file their claims/counter claims before the learned sole Arbitrator whereafter he shall proceed to pass the arbitral award expeditiously subject to his convenience. The fee of the Arbitrator is fixed at Rs.20,000/- in lump sum which shall be paid to him in equal shares by

both the parties. This fee includes all expenses, including secretarial expenses .

A copy of this judgment shall be sent to the Chief Secretary and the Principal Secretary (PW), Government of Himachal Pradesh as well as to the Engineer-in-Chief, HP PWD for their information so that recurrence of the aforesaid violation of law does not take place in future.

The petition is disposed of.

3rd October, 2007. (V.K. Gupta), C.J.
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